United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANTS AND JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,417

ANN E. ARMIGER, *et al.*,

Appellants,

v.

REAL S.A. TRANSPORTES AEREOS,

Appellee.

No. 20,418

MARJORIE H. ALBRECHT, *et al.*,

Appellants,

v.

REAL S.A. TRANSPORTES AEREOS,

Appellee.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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STATEMENT OF QUESTIONS PRESENTED

In suits brought in the District of Columbia against a Brazilian corporation doing business in the District, seeking up to $100,000 damages for each of the alleged wrongful deaths of members of the United States Navy Band in an airplane collision over Rio de Janeiro, Brazil,

1. Does the decision of this Court in *Tramontana v. S.A. Empresa de Viacao Aerea Rio Grandense*, 121 U.S. App. D.C. 338, 350 F.2d 468, permit recovery of damages unrestricted by the 100,000 cruzeiro limitation of the Brazilian Code of the Air by those appellants (a) who reside in states other than Maryland and (b) whose states of residence follow the modern "contacts" theory of conflicts of law rather than the older "lex loci" theory?

2. If such recovery is permitted those appellants under the *Tramontana* ruling, which is concededly controlling here, did the District Court err in refusing to alter the prior summary judgments limiting their maximum recovery to the dollar equivalent of 100,000 cruzeiros and in certifying the cases to the District of Columbia Court of General Sessions?

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APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANTS

JURISDICTIONAL STATEMENT

In each of the two cases before this Court, joint complaints were filed by the respective appellants, under what is now 11 D.C. Code § 521(a), against the appellee Real S.A. Transportes Aereos, a Brazilian corporation t/a Real Airlines. These complaints alleged that the appellee had negligently caused the death of the seventeen individuals represented by or related to the various appellants. The deaths all oc-

curred on February 25, 1960, in Rio de Janeiro, Brazil, in a mid-air collision of two airplanes, one of which was owned and operated by the appellee. The alleged damages claimed by the various appellants varied in amounts from $50,000 to $100,000.

After filing an answer to each of the two complaints, appellee moved for summary judgments in the two cases for so much of each appellant's claim as exceeds the United States dollar equivalent of 100,000 cruzeiros in Brazilian currency. These motions were based upon Article 102 of the Brazilian Code of the Air, limiting recovery for deaths resulting from mid-air plane collisions to the stated amount.

On October 14, 1963, the District Court in each case entered an "Order Granting Summary Judgment and Stetting Cause." This order, which was identical in the two cases, contained three provisions: (1) an order granting the summary judgment motion "as to so much of the plaintiffs' claims as exceed the dollar equivalent of one hundred thousand (100,000) cruzeiros in Brazilian currency for each of the deaths for which the several plaintiffs seek damages," (2) an order that "should plaintiffs establish a right to recovery herein, the total award to the plaintiffs, based upon the death of any one decedent, should not exceed the dollar equivalent of the sum of one hundred thousand (100,000) cruzeiros in Brazilian currency according to the prevailing rate of exchange on the date of entry of any such judgment," and (3) an order that "proceedings in this case be stayed pending the final disposition of any appeal taken in the case of *Beatrice Antonette Tramontana v. S.A. Empresa De Viacao Aerea Rio Grandense, t/a Varig Airlines,* Civil Action No. 637-62 in this Court, counsel having stipulated that the final ruling in said case will be controlling herein."

These two cases thereafter lay dormant, awaiting the outcome of the appeal in the *Tramontana* case. This Court rendered its opinion in the *Tramontana* case on June 10, 1965, and a petition for rehearing *en banc* was denied on October 4, 1965. Finally, on March 21, 1966, the

Supreme Court denied a petition for writ of certiorari. Thereafter, the *Tramontana* judgment for $170 was executed, and a praecipe was filed showing that the judgment was "paid and satisfied."

On April 28, 1966, the appellee filed in each of the instant cases a motion to certify the case to the District of Columbia Court of General Sessions. Upon consideration of the motions, oppositions thereto, and oral argument thereon, the District Court on June 28, 1966, entered orders certifying the cases to the Court of General Sessions.

On July 14, 1966, appellants duly filed notices of appeal from the District Court's action certifying the cases. After the cases were docketed in this Court, an order was entered consolidating the two appeals in this Court for all purposes. And on October 11, 1966, this Court denied a motion by appellee to summarily affirm or dismiss the appeals for want of substance.

This Court's jurisdiction is invoked under 28 U.S.C. § 1291.

STATEMENT OF THE CASE

These are two of the three cases instituted in the District Court below growing out of a mid-air collision of two airplanes over Rio de Janeiro, Brazil, on February 25, 1960. Eighteen members of the United States Navy Band were killed in that collision; and these three suits were brought by their personal representatives and next of kin. But one of the decedents was represented in the *Tramontana* case. Here, in the *Armiger* appeal (No. 20,417), eleven decedents are represented; and in the *Albrecht* appeal (No. 20,418), six decedents are represented.

In footnote 3 of the *Tramontana* opinion, this Court took notice of the existence and pendency of the instant cases and the stipulations herein to the effect that the final ruling in *Tramontana* "will be controlling herein." 121 U.S. App. D.C. 338, 350 F.2d 468, 469-470. Since the

basic facts are identical in all three cases and are set forth in the *Tramontana* opinion, see 350 F.2d at 469, it suffices to say here that the fatal collision of the two airplanes took place within the territorial limits of Brazil as the two planes were approaching landing fields near Rio de Janeiro. The two planes were a civilian DC-3 aircraft, owned by the appellee, and a United States Navy R6D-1 aircraft. Included on board the Navy aircraft were the eighteen members of the United States Navy Band here involved. Negligence has been charged to the appellee in its control and operation of the DC-3 plane, thereby causing the deaths of the Bandsmen.

The complaints in the instant cases were both filed on February 24, 1961. J.A. 1, 14. The complaint in the *Armiger* case, No. 20,417 identified the representatives and next of kin of the decedents involved as residing in the following jurisdictions:

1. *Maryland* - those representing the decedents Armiger, D'Amico, Micallef, Mohs, Richey, Penland, Wilklow and Rosenthal.
2. *California* - those representing the decedent Gaglio.
3. *New York* - those representing the decedents Meier and Bergey.

In the *Albrecht* case, No. 20,418, the complaint identified the residences of the representatives and next of kin as follows:

1. *District of Columbia* - the one representative of the decedent Clark.
2. *Maryland* - those representing the decedent Albrecht.
3. *Pennsylvania* - those representing the decedents Bein and Desiderio.
4. *Wisconsin* - those representing the decedent Harl.
5. *North Carolina* - those representing the decedent Young.

The appellee was in both instances identified as a Brazilian corporation

located in and doing business within the District of Columbia. J.A. 4, 15. Service was properly effected on the appellee and answers were duly filed by the appellee. J.A. 8, 17.

As in the *Tramontana* case, the suits were instituted under what is now 11 D.C. Code § 521(a), conferring jurisdiction on the District Court of all civil actions between parties "where either one or both of them are resident or found within the District." Damages were sought in varying amounts ranging from $50,000 to $100,000.

The answers filed by the appellee not only denied any negligence on its part but asserted that by reason of the fact that "the aforesaid collision occurred within the sovereign air space of Brazil, Plaintiffs' rights of recovery, if any, are governed and controlled by the Codigo Brasileiro do Ar (Air Code of Brazil), and Defendant's liability thereunder is limited to 100,000 cruzeiros per person (approximately U.S. $365)." J.A. 9, 18.

Subsequently, on July 3, 1963, appellee filed summary judgment motions in all three cases, *Armiger*, *Albrecht* and *Tramontana*. All these motions sought judgment for appellee for so much of the appellants' claims as exceed the American dollar equivalent of 100,000 cruzeiros in Brazilian currency — pursuant to the limitation on recovery imposed by Article 102 of the Brazilian Code of the Air. See J.A. 9, 19. The summary judgment motions in the three cases were heard and considered together by the District Court. On October 14, 1963, the District Court granted summary judgments in all three cases. J.A. 11, 20.

By common consent of the District Court and all counsel, the *Tramontana* case was selected as the vehicle for obtaining a final resolution of the applicability of the Brazilian Code of the Air to these cases and of the limitation of liability contained in Article 102 thereof. Accordingly, the *Tramontana* judgment awarded the appellant in that case the sum of $170 — the then dollar equivalent of 100,000 Brazilian cru-

zeiros — and gave summary judgment to the appellee therein for everything in excess of that amount. That judgment formed the basis of the appeal to this Court in the *Tramontana* case.

In the two instant cases, however, the summary judgments had three provisions: (1) a grant of the appellee's motions as to so much of the claims as exceed the dollar amount of 100,000 cruzeiros, (2) a provision that should the appellants establish a right to recovery, the total award, based upon the death of any one decedent, should not exceed the dollar equivalent of 100,000 cruzeiros "according to the prevailing rate of exchange on the date of entry of any such judgment," and (3) a stay of further proceedings in each case "pending the final disposition of any appeal taken in the case of *Beatrice Antonette Tramontana v. S.A. Empresa De Viacao Aerea Rio Grandense, t/a Varig Airlines*, Civil Action No. 637-62 in this Court, counsel having stipulated that the final ruling in said case will be controlling herein." J.A. 11, 20.

No further action occurred in these two cases during the ensuing two and a half years, during which the *Tramontana* case was heard and resolved by this Court and review thereof was denied by the Supreme Court. *Tramontana v. Varig Airlines*, 383 U.S. 943. Thereafter, on April 28, 1966, appellee moved in both cases to certify the proceedings to the District of Columbia Court of General Sessions on the ground that the summary judgment orders of October 14, 1963, as to the claims in excess of the dollar equivalent of 100,000 cruzeiros rendered the claims "not susceptible of an award of an amount equaling ten thousand ($10,000.00) dollars." J.A. 12, 21. Hence the claims were said not to be within the jurisdiction of the District Court "but are within the jurisdiction of the District of Columbia Court of General Sessions." J.A. 12, 21.

In its points and authorities submitted to the District Court, the appellee stated its belief "that in accordance with the current rate of exchange, the dollar equivalent of one hundred thousand (100,000) cruzeiros is less than two hundred ($200.00) dollars and that there is no reasonable

prospect that the said rate of exchange would in the foreseeable future change so that the dollar value of one hundred thousand (100,000) cruzeiros would even approach the sum of ten thousand ($10,000.00) dollars." And in the appellants' opposition to the motions it was stated: "Indeed, the present-day value of 100,000 cruzeiros is about $46.30 in American dollars — much less than the $170 equivalent at the time of the *Tramontana* judgment on October 14, 1963." The District Court accordingly noted in its subsequent orders that counsel for appellants had "made no contention that the dollar equivalent" of 100,000 cruzeiros "could now or at any time in the foreseeable future" reach the $10,000 jurisdictional limit of the court. See. J.A. 13, 23.

Following an oral hearing, the District Court without elaboration granted the motions to certify the cases to the Court of General Session The court thereby rejected appellants' contention that "the final disposition" of the *Tramontana* appeal, which by agreement was "controlling herein," made plain that those appellants who resided outside the state of Maryland (the state of residence of the appellant Tramontana) and who resided in states following the "contacts theory" of conflicts of laws were entitled to recover amounts in excess of the 100,000 cruzeiro limitation. Under appellants' theory, the application of the *Tramontana* ruling to such appellants made it improper and inappropriate to transfer the cases to the Court of General Sessions for a trial as to liability and severely limited damages. The appeals to this Court followed. J.A. 13,24.

STATUTE INVOLVED

Brazilian Code of the Air, published in Diario Oficial of June 27, 1938 (as amended to 1947):

Chapter VIII, Mid-Air Collisions and Accidents

Article 102 - The joint liability with respect to each accident shall be limited:

(a) in the case of physical injury or death to a maximum recovery of one hundred thousand cruzeiros (Cr $100,000.00) for each person;

(b) in the case of damage or destruction of property to a recovery equal to the fair value of the property.

Sole paragraph. The person liable shall not be entitled to benefit by these limits, if the party in interest can prove that the damage was the result of intentional wrongdoing.

STATEMENT OF POINTS

1. The District Court erred in not recognizing that under this Court's ruling in the *Tramontana* case, which by stipulation is "controlling herein," the appellants who reside outside the state of Maryland in jurisdictions following the "contacts" theory of conflict of laws are not restricted, as to maximum possible recovery, by the 100,000 cruzeiro limitation of the Brazilian Code of the Air.

2. The District Court erred in not altering its prior summary judgment orders, which by their terms recognized that the final disposition of the *Tramontana* appeal would be "controlling herein," so as to permit the aforesaid appellants to recover damages unlimited by the provisions of the Brazilian Code of the Air.

3. The District Court erred, under these circumstances, in certifying these cases to the District of Columbia Court of General Sessions

SUMMARY OF ARGUMENT

By common agreement and stipulation, "the final disposition" of the *Tramontana* appeal is to be "controlling herein." Moreover, this Court in *Tramontana* was fully aware of the pendency of the instant cases and carefully refrained from commenting upon or resolving the

damage limitation questions at issue here. Such restraint by this Court is fully consistent with the obligation of the District Court to reassess its actions in the instant proceedings in the light of the *Tramontana* ruling.

The central focus in these two appeals must accordingly be on an interpretation of the *Tramontana* ruling of this Court and on an application of the *Tramontana* principles to the facts of these cases. That ruling may be analyzed as follows:

1. The conflicts law of the District of Columbia now is that where a conflict exists as to a particular issue, like limitation of damages, the law of the jurisdiction with the more substantial interest in the resolution of that issue is applied.

2. In weighing the respective interests in the resolution of the damage limitation issue, the jurisdiction wherein the wrongful death plaintiff resides has a substantial and controlling concern. It is upon that jurisdiction that the burden of supporting the plaintiff and next of kin will fall if adequate damages are not recoverable. But since the plaintiff in the *Tramontana* case was not a District of Columbia resident, the District did not have an interest sufficient to outweigh that of Brazil stemming from Brazil's concern in limiting the liability of its domestic airlines.

3. Since the plaintiff in *Tramontana* was a resident of Maryland, it becomes necessary to weigh the competing interests of Maryland and Brazil. Maryland, as the state of plaintiff's residence, had an obvious and controlling interest in the issue at stake. But Maryland follows the traditional *lex loci* rule of choice-of-law and does not give effect to its controlling interest or contact with the matter at issue; it applies automatically the law of the place of the accident, Brazil. Hence the District of Columbia should not permit the plaintiff to recover anything more in the District than she could recover in her home state of Mary-

land. She was therefore bound by the 100,000 cruzeiro limitation of the Brazilian Code of the Air - or about $170 in American dollars.

Applying those principles to these cases, those appellants who reside in states, other than Maryland, which give recognition to the controlling interest in choosing between conflicting rules of law are entitled to recover damages without regard to the Brazilian limitation. *Tramontana* established that the state of residence has the controlling interest as to the amount of recoverable damages. Thus appellants residing in such jurisdictions as the District of Columbia, New York, Pennsylvania, California, and Wisconsin are free of the Brazilian limitation. Those states have adopted the "contacts" theory and would permit recovery without regard to the Brazilian Code of the Air, given the *Tramontana* proposition that residence is the controlling factor. Those appellants residing in Maryland, of course, are bound by the Brazilian limitation, for the reasons given in *Tramontana* with respect to Maryland law.

Under these circumstances, it was error for the District Court not to alter its prior summary judgment orders — execution of which was stayed pending the *Tramontana* appeal — so as to permit unlimited recovery by those appellants who are not bound by the Brazilian limitation. And the orders certifying these cases to the Court of General Sessions were, for the same basic reasons, arbitrary and legally erroneous. Certification was obviously improper as to those claims which are freed of the Brazilian limitation on recovery; and the other claims should be retained by the District Court for common trial and resolution with the unlimited claims.

ARGUMENT

These two appeals are the obvious sequels to this Court's decision in the *Tramontana* case. By stipulation of all the parties herein, that decision is "controlling" as to the limitations, if any, upon the maximum damages recoverable by these appellants. But to assess the "controlling" impact of the *Tramontana* ruling involves something more than a blind acceptance of the result reached in that case.

The *Tramontana* ruling, in order words, must be viewed and applied here in light of this Court's careful analysis of the conflicts of laws problem at stake, an analysis which can lead to differing results based upon differences in the critical and controlling facts. Indeed, this Court in *Tramontana* was fully aware of the pendency of these two cases in the District Court and took pains to point out, in footnote 3 of its opinion, that the record then before the Court was not enlarged to encompass the instant proceedings. "We, of course, decide only the case before us," said the Court. 121 U.S. App. D.C. 338, 350 F.2d 468, 470, fn. 3. The Court thereby left open for another day any consideration of the application of the *Tramontana* ruling to the facts of these two cases. By no means can it be said that this Court intended its *Tramontana* ruling to be applied automatically or uncritically to these cases. That ruling can fairly be applied here only by giving recognition to the critical factual and legal distinctions expressed in the opinion, distinctions which can and do lead in certain situations to the opposite result from that rendered on the facts in *Tramontana*.

Appellants maintain that the District Court failed to heed the distinctions plainly expressed in *Tramontana*. Had those distinctions been recognized, the conclusion would necessarily follow that at least certain of these appellants — in light of the law of the states wherein they reside — are not bound by the limitations on recovery expressed in the Brazilian Code of the Air. Once that conclusion has been established,

the ensuing error of the District Court in failing to alter its prior summary judgments and in certifying these cases to the Court of General Sessions becomes manifest.

I

Under the Tramontana Decision Those Appellants Residing in States Following the "Contacts" Theory of Conflicts of Law May Recover Damages Without Regard to the Limitations of Brazilian Law.

To understand the "controlling" effect of the *Tramontana* decision with respect to the instant cases requires, of course, a careful analysis of the *Tramontana* rationale. And such an analysis may fairly be made as follows:

(1) The *Tramontana* decision established, as the rule in the District of Columbia, "that where a conflict of law as to a particular issue exists the law of the jurisdiction with the more substantial interest in the resolution of the issue is applied." *Dovell v. Arundel Supply Corporation,* U.S. App. D.C. , 361 F.2d 543, 544. See also *Williams v. Rawlings Truck Line,* 123 U.S. App. D.C. , 357 F.2d 581. In other words, the Court adopted, as the conflicts law of the District of Columbia, the choice-of-law rule that takes "into account the interests of the State having significant contact with the parties to the litigation." *Richards v. United States,* 369 U.S. 1, 12. Thereby abandoned was the former District of Columbia rule of *lex loci,* the rule that the right of recovery and the amount of recoverable damages necessarily depend upon the law of the jurisdiction in which the accident and injury occurred. See *Giddings v. Zellan,* 82 U.S. App. D.C. 92, 93, 160 F.2d 585, 586; *Rubenstein v. Williams,* 61 U.S. App. D.C. 266, 61 F.2d 575.

(2) Since there was a conflict of law as to the maximum recoverable damages as between Brazil (which has a 100,000 cruzeiro limitation) and the District of Columbia (which has no limitation), the *Tra-*

montana opinion proceeded under the new "contacts" theory to weigh the respective interests of those two jurisdictions as to the issue of maximum recoverable damages. In that weighing process, Brazil was found to have much the greater weight. Not only was Brazil the scene of the accident but it had a national concern with the commercial well-being and financial integrity of the defendant airline, a concern that exhibited itself in the 100,000 cruzeiro limitation of liability. On the other hand, the District of Columbia's interest in this issue was, "if not wholly remote, certainly less than Brazil's" (350 F.2d at 473) particularly because "neither appellant, her children, nor her husband were or are resident or domiciled in the District of Columbia" (350 F.2d at 472). Thus if the appellant Tramontana or her children "should ever become public charges, the burden will rest not on the District of Columbia but on the citizens of Maryland, where appellant resides" (350 F.2d at 473).

(3) There was thus made manifest in the *Tramontana* opinion a critical factor in the weighing process - the residence or domicile of the plaintiff. Had the appellant in *Tramontana* been a District resident, there is every reason to believe that such residence would have given the District a superior concern over that of Brazil, justifying the application of the unlimited recovery rule of the District. Indeed, so decisive was the residential factor that this Court felt obliged, despite the absence of any argument by the parties in this regard, to weigh the respective interests of Brazil and of Maryland (the place of appellant's residence). And in referring to Maryland's concern with the issue of maximum recovery, this Court several times mentioned that Maryland as the state of residence "might be thought to have a substantial interest in the amount recoverable for his death" and had an "interest in the matter of appellant's recovery [that] is not insignificant, for it is on the citizens of Maryland that the burden of her support, if she is unable to support herself, is likely to fall in the first instance." See 350 F.2d at 473.

(4) This Court then proceeded to discuss and weigh the interest of Maryland in terms of whether Maryland would "have ignored the Brazilian limitation on recovery if this action had been brought there originally." 350 F.2d at 474. The Court concluded, although conceding that the matter was not entirely clear, that Maryland would not have ignored the Brazilian limitation. And, said the *Tramontana* opinion (350 F.2d at 475), "if a Maryland court would not disregard Brazilian law for the benefit of one of its own residents in a suit brought there, why should a court sitting in the District of Columbia do so at the expense of substantial and legitimate interests of Brazil?"

To summarize, the *Tramontana* opinion holds that the residence or domicile of the plaintiff becomes the decisive factor or interest justifying the application of the recovery limitation law of the state of residence in preference to that of Brazil - at least where the state of residence would, if the suit had been brought there, have viewed the problem in terms of competing contacts or interests.

Thus the critical factor involved in assessing the impact of the *Tramontana* ruling on these cases is whether the jurisdictions wherein the various appellants reside recognize the newer conflicts rule whereby the respective interests of the competing jurisdictions in the issue involved are to be weighed. If the residential state does follow the newer conflicts rule, the *Tramontana* opinion makes plain that in this setting the residence or domicile of the plaintiff would overcome any interest of Brazil - thus permitting the District of Columbia to apply the recovery rule of the residential state that gives voice to that state's interest. Under these circumstances, indeed, the Full Faith and Credit Clause of the Constitution might well require the District to recognize and apply the recovery rule of the state of residence. See *Hughes v. Fetter,* 341 U.S. 609; *Home Ins. Co. v. Dick,* 281 U.S. 397. Only if the residential state, such as Maryland, adheres to the old *lex loci* rule and declines to follow the weighing process in suits brought in its own

courts will the District of Columbia decline to apply the recovery rule of the residential state.

Based upon this analysis of the *Tramontana* opinion, the following conclusions must be reached as respects the various appellants in the two instant cases:

(1) Those appellants who reside in Maryland are, by virtue of the *Tramontana* decision respecting Maryland law, bound by the Brazilian limitation on recovery.

(2) The one appellant in the *Albrecht* case, Margaret K. Clark, who resided in the District of Columbia upon the filing of suit, is not bound by the Brazilian limitation. Both she and her deceased husband having been residents of the District, the District has a substantial concern in her welfare; moreover, as her affidavit demonstrates (J.A. 21), her husband's duties with the United States Navy Band were centered in the District. These factors combine to outweigh those of Brazil. And the *Tramontana* opinion is itself conclusive evidence that the District would permit her suit and would permit unlimited recovery based upon an assessment of competing interests. The *lex loci* rule is no longer followed in the District.

(3) Those appellants residing in New York, such as the appellants Meier and Bergey, are clearly entitled to unlimited maximum recovery, as permitted by New York law. New York is one of the states in the forefront of the newer conflicts concept that weighs respective interests rather than relying rigidly on the *lex loci* rule. See, e.g., *Babcock v. Jackson*, 12 N.Y. 2d 473, 191 N.E. 2d 279; *Long v. Pan American World Airways*, 16 N.Y. 2d 337, 213 N.E. 2d 796; *Kilberg v. Northeast Airlines*, 9 N.Y. 2d 34, 172 N.E. 2d 526; *Pearson v. Northeast Airlines*, 309 F.2d 553 (C.A. 2), cert. denied, 373 U.S. 912; *Macey v. Rozbicki* (N.Y. Ct. App., Oct. 10, 1966), 35 LW 2236.

(4) Pennsylvania has likewise ruled "that the strict lex loci delicti rule should be abandoned in Pennsylvania in favor of the more flexible rule which permits analysis of the policies and interests underlying the particular issue before the court." *Griffith v. United Air Lines*, 416 Pa. 1, 203 A.2d 796. See also *Kuchinic v. McCrory* (Pa. Sup. Ct., Sept. 27, 1966), 35 LW 2206. This means that the appellants Bein and Desiderio in the *Albrecht* case could recover unlimited damages had suit been brought in Pennsylvania, their residence in that state being sufficient under the *Tramontana* rule to overcome Brazil's interests. The District must therefore recognize the unlimited recovery rule of Pennsylvania and give effect to it as to these appellants.

(5) California, which also has an unlimited recovery policy, is yet another state which recognizes the newer conflicts rule of weighing competing interests. See *Grant v. McAuliffe*, 41 Cal. 2d 859, 264 P.2d 944. Hence the District must recognize the right of the appellant Gaglio in No. 20,417 to recover an unlimited degree of damages, premised upon the controlling factor of her residence in California.

(6) Wisconsin, too, recognizes the newer conflicts rule. See *Wilcox v. Wilcox*, 26 Wis. 2d 617, 133 N.W.2d 408; *Haumschild v. Continental Casualty Co.*, 7 Wis.2d 130, 95 N.W.2d 814, cited in *Richards v. United States*, 369 U.S. 1 at 12, n. 26. The appellant Harl in the *Albrecht* case would accordingly be entitled to recover damages without regard to the Brazilian limitation, at least up to the $20,000 figure permitted by Wisconsin law. See Kreindler, Aviation Accident Law. Vol. 1, § 11.01(4), p. 345 (1963).

(7) Finally, with respect to the appellant Young in the *Albrecht* case, his residence in North Carolina might not be sufficient under North Carolina law to permit him to take advantage of the unlimited recovery policy of that state. North Carolina apparently still follows the rule that the "claimant's right to recover and the amount which

may be recovered for personal injuries must be determined by the law of the state where the injuries were sustained." *Shaw v. Lee*, 258 N.C. 609, 129 S.E.2d 288. But cf. *Lowe's North Wilkesboro Hardware, Inc. v. Fidelity Mutual Life Insurance Co.*, 319 F.2d 469 (C.A. 4), where a North Carolina plaintiff brought a diversity action in a federal court in North Carolina against a Pennsylvania insurance company for negligent delay in acting on an insurance application; Pennsylvania law was applied since Pennsylvania was said to have the most significant contacts with the tort and the parties. But even if the appellant Young be found to be bound by the Brazilian limitation, the identity of his cause of action with those of other appellants who are uninhibited by the Brazilian limitation makes it unwise and unnecessary to remit him to the Court of General Sessions.

In summary, then, due respect for the *Tramontana* opinion demands that the various appellants herein be treated other than as an indiscriminate conglomeration of persons suing a Brazilian corporation for damages resulting from a fatal incident in Brazil. The core of the *Tramontana* ruling was its recognition of the controlling interest of the plaintiff's state of residence with respect to the issue of recoverable damages. And if that state also permits such a controlling interest to govern in a choice-of-law situation, rather than relying upon the traditional *lex loci* principles, the District of Columbia will permit that plaintiff to obtain the same benefits of unlimited damage recovery as the plaintiff would have received in his own state under the "contacts" theory.

The sole reason why the appellant in *Tramontana* was held bound by the Brazilian limitation of 100,000 cruzeiros was this Court's belief that Maryland, the state of that appellant's residence, would have followed the *lex loci* principles and would not have permitted the factor of residence to be weighed, much less to control, in the process of determining which law of damages to apply. It necessarily follows that

where the law of the state of residence of some other plaintiff clearly permits such a weighing of competing interests, the District of Columbia must respect that law and will permit the controlling factor of residence to govern the issue of damages. And so, as demonstrated, those appellants herein who reside in such jurisdictions as New York, Pennsylvania, California, the District of Columbia, and Wisconsin are clearly entitled to recover damages unrestricted by the Brazilian Code of the Air. Only those appellants residing in Maryland, and possibly North Carolina, are confined to the 100,000 cruzeiro limitation.

Such, then, is the "controlling" effect of the *Tramontana* ruling in the instant cases.

II

In Light of the Impact of the Tramontana Decision, the District Court Erred in Refusing To Alter Its Prior Summary Judgments and in Certifying These Cases to the Court of General Sessions.

If it be accepted that the *Tramontana* ruling permits unlimited recovery of damages by certain of these appellants, it was obvious error for the District Court to refuse to alter its summary judgment orders of October 14, 1963, which restricted such appellants' recovery to the dollar equivalent of 100,000 cruzeiros as of the date of entry of final judgment. Those summary judgment orders were expressly conditioned upon the stipulation of counsel that the final disposition of the *Tramontana* appeal "will be controlling herein" - thereby recognizing that the *Tramontana* ruling might be such as to require that the summary judgment orders be changed or even vacated.

Indeed, had the *Tramontana* decision been to the effect that under no circumstances would the Brazilian limitation of 100,000 cruzeiros be recognized in a suit brought in the District of Columbia - which was in fact one of the arguments advanced before this Court by the appel-

lant - there could be no dispute as to the obligation of the District Court to vacate its summary judgment orders in these cases and to permit appellants to recover damages without limitation. One of the reasons why further action in the instant cases was stayed pending the outcome of the *Tramontana* appeal was to permit just such an alteration to be made in the summary judgment orders should the *Tramontana* decision so dictate. And by the same token, where the *Tramontana* appeal has created the need for carefully distinguishing between plaintiffs, allowing some to recover unlimited damages and restricting others to the Brazilian standard, the summary judgment orders must be adjusted accordingly - both as a matter of legal necessity and as a matter of the conditions and intent of the summary judgment orders themselves.

And, as has been previously emphasized, footnote 3 of this Court's opinion in *Tramontana* expressly recognized the pendency of these two cases and the stay of further proceedings pending the outcome of the *Tramontana* appeal. This Court's care in making clear that it was not considering or passing judgment on the instant cases is fully consistent with the possibility that this Court may well have intended the District Court to reconsider its summary judgment orders in the instant cases and to make necessary adjustments therein to conform to the principles and rationale of the *Tramontana* opinion. The failure of the District Court to do so must be considered plain error.

Under these circumstances, moreover, it was also error for the District Court to certify these cases to the Court of General Sessions. The necessary and only premise of those certification orders was that none of the appellants could conceivably, now or in the foreseeable future, recover more than a pittance under the 100,000 cruzeiro limitation, much less the requisite jurisdictional amount of $10,000.

But that premise has been shown here to be legally erroneous, at least as to certain of the appellants. Under the *Tramontana* ruling,

some of these appellants living in jurisdictions other than Maryland are entitled to recover up to their claimed damages of $100,000 for the alleged wrongful deaths. As to them, certainly, certification of their claims to the Court of General Sessions is legally erroneous.

Additionally, the interests of expeditious judicial administration would demand that all claims be kept within the District Court for common trial and resolution. To order certain plaintiffs to pursue their claims in the Court of General Sessions while permitting others to try their claims in the District Court would produce multiple, time-consuming and possibly inconsistent litigation concerning identical causes of action. In such circumstances, the claims should be considered together and simultaneously by the District Court, which would then be obliged to make distinctions among the plaintiffs as to the maximum amounts recoverable should liability be established at trial.

These certification orders are, of course, appealable to and reviewable by this Court. *Barnard v. Schneider*, 100 U.S. App. D.C. 152, 243 F.2d 258; *Gray v. Evening Star Newspaper Co.*, 107 U.S. App. D.C. 292, 277 F.2d 91. While the sole issue open on such an appeal is whether the District Court acted arbitrarily and abused its discretion in ordering a transfer, it is clear that the legal reasons underlying the exercise of discretion are open to examination in this Court. As was said in *Davis v. Peerless Insurance Co.*, 102 U.S. App. D.C. 125, 255 F.2d 534 at 536:

> "Appellee next claims that the record discloses a rational foundation for the conclusion of the trial judge [respecting transfer], and accordingly, we must affirm his order as not arbitrary. To be sure, the exercise of the trial court's discretion normally will not be disturbed on appeal unless it is arbitrary, *but it becomes arbitrary if that discretion has been exercised for an erroneous reason.* Accordingly we inquire into the basis for the order under attack." [Emphasis added.]

In these cases the "erroneous reason" underlying the certification orders was a misreading and misapplication of the principles of the *Tramontana* opinion, as detailed in this brief. Had those principles been properly applied, certain claims could not be transferred to the Court of General Sessions; and the remaining claims would, as a matter of sound and expeditious administration of justice, be retainable by the District Court for joint trial and resolution with the non-transferable claims. In that sense, therefore, the discretion involved in entering the certification orders was exercised arbitrarily and for an erroneous reason. The certification orders should accordingly be reversed.

CONCLUSION

For these various reasons, the certification orders should be reversed and the summary judgment orders of October 14, 1963, amended to permit those appellants not bound by the Brazilian limitation to recover up to their claimed damages should liability be established.

Respectfully submitted,

EUGENE GRESSMAN
Counsel for Appellants
in No. 20,417

WILLIAM HOWARD PAYNE
Counsel for Appellants
in No. 20,418

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[Filed February 24, 1961]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ANN E. ARMIGER, individually and
as executrix of the estate of
E. L. ARMIGER, deceased,
LANA MAE ARMIGER, a minor, by
her mother and next friend
Ann E. Armiger
4803 N Street, S.E.
Washington 27, D.C.

JUDITH D'AMICO, individually and
as administratrix of the estate
of ANTHONY M. D'AMICO,
deceased
1910 Red Oak Drive
Adelphi, Maryland

ISABEL M. GAGLIO, individually
and as administratrix of the
estate of R. S. GAGLIO, JR.,
deceased,
JUANITA GAGLIO, REYES GAGLIO,
YOLANDA GAGLIO and TERESA GAGLIO,
minors, by their mother and
next friend Isabel M. Gaglio
13561 Springdale Street
Westminister, California

HAROLD J. MEIER, individually and
as administrator of the estate of
GERALD R. MEIER, deceased
MRS. HAROLD J. MEIER
229 Niagara Street
Lockport, New York

Civil Action No. 592-61

NORENE MICALLEF, individually and
as administratrix of the estate of
R. H. MICALLEF, deceased,
RAYMOND CORBETT MICALLEF
CYNTHIA RAE MICALLEF and
KAREN IONE MICALLEF, minors, by
their mother and next friend
Norene Micallef
2821 — 64th Avenue
Cheverly, Maryland

ELIZABETH LOUISE MOHS, individually
and as executrix of the estate of
JAMES ALAN MOHS, deceased,
5116 Mangum Road
College Park, Maryland

ARLENE E. RICHEY, individually and
as executrix of the estate of
EARL W. RICHEY, deceased
DAWN RICHEY, ALAN RICHEY and
LORETTA RICHEY, minors, by their
mother and next friend
Arlene E. Richey
6722 Eldridge Street
Hyattsville, Maryland

EUGENE GRESSMAN, administrator
of the estate of WALTER M. PENLAND
deceased, MILTON G. BERGEY
deceased, ROGER BRUCE WILKLOW,
deceased, JEROME ROSENTHAL,
deceased
7709 Westfield Drive
Bethesda, Maryland

PHYLLIS ANNE PENLAND, individually
and as mother and next friend of
DEBORAH SUSAN PENLAND, PAMELA
JOY PENLAND, MICHELLE MARIE

PENLAND and LAURA LYNN PENLAND, minors
6415 Cedar Lane, S.E.
Temple Hills, Maryland

MILTON C. BERGEY and
MARION ELIZABETH BERGEY
Woodland Drive
Huntington 12, New York

BEVERLY WILKLOW
4702 Fordham Road
College Park, Maryland

FRANCES ROSENTHAL, individually and
as mother and next friend of
LEO JOSEPH ROSENTHAL and
KAREN ROSENTHAL, minors
540 South Hampton Drive
Silver Spring, Maryland

Plaintiffs,

v.

REAL S. A. TRANSPORTES AEREOS
a Brasilian corporation t/a
REAL AIRLINES
1725 K Street, N.W.
Washington, D.C.

Defendant.

COMPLAINT FOR DAMAGES FOR DEATH BY WRONGFUL ACTION

1. The amount of recovery sought in this case exceeds Three Thousand ($3,000.00) Dollars and jurisdiction of this cause is conferred on this Court by Section 306, Title 11, of the District of Columbia Code, 1951 Edition.

2. The plaintiffs, Ann E. Armiger, Judith D'Amico, Isabel M. Gaglio, Harold J. Meier, Norene Micallef, Elizabeth L. Mohs, Arlene E. Richey and Eugene Gressman are the duly appointed, qualified and act-

ing personal representatives of the estate of the following deceased persons: E. L. Armiger, Anthony M. D'Amico, R. S. Gaglio, Jr., Gerald R. Meier, R. H. Micallef, James Alan Mohs, Earl W. Richey, Walter M. Penland, Milton G. Bergey, Roger Bruce Wilklow and Jerome Rosenthal. The deceased persons named, died within the maritime and territorial limits of Brazil on February 25, 1960. Said E. L. Armiger left him surviving his spouse, Ann E. Armiger and his minor daughter, Lana Mae Armiger; Anthony M. D'Amico left him surviving his spouse, Judith D'Amico; said R. S. Gaglio, Jr., left him surviving his spouse, Isabel M. Gaglio and Juanita Gaglio, Reyes Gaglio, Yolanda Gaglio and Teresa Gaglio, his minor children; said R. H. Micallef left him surviving his spouse, Norene Micallef and Raymond Corbett Micallef, Cynthia Rae Micallef and Karen Ione Micallef, his minor children; said Gerald R. Meier left him surviving his father and mother, Mr. Harold J. Meier and Mrs. Harold J. Meier; said James Alan Mohs left him surviving his spouse, Elizabeth Louise Mohs; said Earl W. Richey left him surviving his spouse, Arlene E. Richey and Dawn Richey, Alan Richey and Loretta Richey, his minor children; said Walter M. Penland left him surviving his spouse, Phyllis Anne Penland and Deborah Susan Penland, Pamela Joy Penland, Michelle Marie Penland and Laura Lynn Penland, his minor children; said Milton G. Bergey left him surviving his father and mother, Milton C. Bergey and Marion Elizabeth Bergey; said Roger Bruce Wilklow left him surviving his spouse, Beverly J. Wilklow; said Jerome Rosenthal left him surviving his spouse, Frances Rosenthal and Lee Joseph Rosenthal and Karen Rosenthal, his minor children.

3. The defendant Real S. A. Transportes Aereos is a Brazilian corporation trading as Real Airlines and doing business in the District of Columbia.

4. Plaintiffs Ann E. Armiger and Lana Mae Armiger, a minor, are residents and citizens of the state of Maryland. Plaintiff Judith D-Amico is a resident and citizen of the State of Maryland. Plaintiffs Isabel M. Gaglio and Juanita Gaglio, Reyes Gaglio, Yolanda Gaglio and Teresa

Gaglio, minors, are residents and citizens of the State of California. Plaintiffs Harold J. Meier and Mrs. Harold J. Meier are residents and citizens of the State of New York. Plaintiffs Norene Micallef and Raymond Corbett Micallef, Cynthia Rae Micallef and Karen Ione Micallef, minors, are residents and citizens of the State of Maryland. Plaintiff Elizabeth Louise Mohs is a resident and citizen of the State of Maryland. Plaintiff Arlene E. Richey is a resident and citizen of the State of Maryland. Plaintiffs Phyllis Anne Penland Deborah Susan Penland, Pamela Joy Penland, Michelle Marie Penland and Laura Lynn Penland, minors, are residents and citizens of the State of Maryland. Plaintiffs Milton C. Bergey and Marion Elizabeth Bergey are residents and citizens of the State of New York. Plaintiff Beverly J. Wilklow is a resident and citizen of the State of Maryland. Plaintiffs Frances Rosenthal and Leo Joseph Rosenthal and Karen Rosenthal, minors, are residents and citizens of the State of Maryland. Plaintiff Eugene Gressman, administrator of the estates of Walter M. Penland, Milton G. Bergey, Roger Bruce Wilklow and Jerome Rosenthal is a resident of the State of Maryland.

5. On or about February 25, 1960, the decedents above named were members of the United States Navy and were passengers on a Naval air craft which was in mid-air collision with an air craft owned and operated by the defendant Real S. A. Transportes Aereos; the mid-air collision aforesaid took place at Rio de Janeiro, Brazil, and was due to the negligent manner in which the defendant operated its air craft at the time and place aforesaid.

6. As a result of the negligence of the defendant aforesaid, the plane in which the decedents were passengers was caused to fall causing the death of the following named decedents: E. L. Armiger, Anthony M. D'Amico, R. S. Gaglio, Jr., Gerald R. Meier, R. H. Micallef, James Alan Mohns, Earl W. Richey, Walter M. Penland, Milton G. Bergey, Roger Bruce Wilklow and Jerome Rosenthal.

7. As a result of the negligence of the defendant aforesaid, the surviving spouses of the various decedents and next of kin of the various decedents suffered pecuniary loss, loss of support and in addition thereto suffered grief and mental anguish.

WHEREFORE, plaintiffs demand judgment against the defendant as follows:

(1) Plaintiff Ann E. Armiger, individually and as executrix of the estate of E. L. Armiger, deceased, the sum of Fifty Thousand ($50,000.00) Dollars and the costs of this action.

(2) The plaintiff Lana Mae Armiger, a minor, the sum of Fifty Thousand ($50,000.00) Dollars and the costs of this action.

(3) The plaintiff Judith D. Amico, individually and as administratrix of the estate of Anthony M. D'Amico, deceased, the sum of Fifty Thousand ($50,000.00) Dollars and the costs of this action.

(4) The plaintiff Isabel M. Gaglio, individually and as administratrix of the estate of R. S. Gaglio, Jr., deceased, the sum of Fifty Thousand ($50,000.00) Dollars and the costs of this action.

(5) The plaintiffs Juanita Gaglio, Reyes Gaglio, Yolanda Gaglio and Teresa Gaglio, all minors, the sum of One Hundred Thousand ($100,000.00) Dollars and the costs of this action.

(6) The plaintiff Harold J. Meier, individually and as administrator of the estate of Gerald R. Meier, deceased, and Mrs. Harold J. Meier, individually, the sum of Fifty Thousand ($50,000.00) Dollars and the costs of this action.

(7) The plaintiff Norene Micallef, individually and as administratrix of the estate of R. H. Micallef, deceased, the sum of Fifty Thousand ($50,000.00) Dollars and the costs of this action.

(8) The plaintiffs Raymond Corbett Micallef, Cynthia Rae Micallef and Karen Ione Micallef, all minors, the sum of One Hundred Thousand ($100,000.00) Dollars and the costs of this action.

(9) The plaintiff Elizabeth Louise Mohs, individually and as execu-

trix of the estate of James Alan Mohs, deceased, the sum of Fifty Thousand ($50,000.00) Dollars and the costs of this action.

(10) The plaintiff Arlene E. Richey, individually and as executrix of the estate of Earl W. Richey, deceased, the sum of Fifty Thousand ($50,000.00) Dollars and the costs of this action.

(11) The plaintiffs Dawn Richey, Alan Richey and Loretta Richey, all minors, the sum of Seventy Five Thousand ($75,000.00) Dollars and the costs of this action.

(12) The plaintiff Eugene Gressman, administrator of the estates of Walter M. Penland, deceased, Milton G. Bergey, deceased, Roger Bruce Wilklow, deceased and Jerome Rosenthal, deceased, the sum of Two Hundred Thousand ($200,000.00) Dollars and the costs of this action.

(13) The plaintiff Phyllis Anne Penland, individually, and Deborah Susan Penland, Pamela Joy Penland, Michelle Marie Penland and Laura Lynn Penland, all minors, the sum of One Hundred Thousand ($100,000.00) Dollars and the costs of this action.

(14) The plaintiffs Milton C. Bergey and Marion Elizabeth Bergey, the sum of Fifty Thousand ($50,000.00) Dollars and the costs of this action.

(15) The plaintiff Berverly J. Wilklow, the sum of Fifty Thousand ($50,000.00) Dollars and the costs of this action.

(16) The plaintiff Frances Rosenthal and Leo Joseph Rosenthal and Karen Rosenthal, both minors, the sum of Seventy Five Thousand ($75,000.00) Dollars and the costs of this action.

EUGENE GRESSMAN
1730 K Street, N.W.
Washington, D.C.

HYMAN SMOLLAR
517 Wyatt Building
Washington 5, D.C.

Attorneys for the Plaintiffs

Demand for Jury Trial

Plaintiffs demand a trial by jury.

HYMAN SMOLLAR

[Filed April 20, 1961]

ANSWER OF DEFENDANT TO COMPLAINT

FIRST DEFENSE

1. Defendant denies the allegations in paragraph 1 of Plaintiffs' Complaint.

2. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 2 of the Complaint.

3. Defendant admits the allegations in paragraph 3 of the Complaint.

4. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 4 of the Complaint.

5. Defendant admits that a mid-air collision took place on or about February 25, 1960 between an aircraft operated by Defendant and a United States Navy plane in the vicinity of Rio de Janeiro, Brazil, but Defendant denies the remaining allegations in paragraph 5 of the Complaint and denies any negligence on its part whatsoever.

6. Defendant denies that any negligence on its part caused the deaths of any person. Defendant is without knowledge or information sufficient to form a belief as to whether the persons referred to in paragraph 6 of the Complaint were in the accident.

7. Defendant denies any negligence on its part. Defendant is without information or knowledge sufficient to form a belief as to the truth of the remaining allegations in paragraph 7 of the Complaint.

WHEREFORE, Defendant says it is not indebted to Plaintiffs in any amount whatsoever.

SECOND DEFENSE

1. Defendant adopts herein the allegations of its first defense.

2. By reason of the fact that the aforesaid collision occurred within the sovereign air space of Brazil, Plaintiffs' rights of recovery, if any, are governed and controlled by the Codigo Brasileiro do Ar (Air Code of Brazil), and Defendant's liability thereunder is limited to 100,000 cruzeiros per person (approximately US$ 365).

WHEREFORE, Defendant's liability to each Plaintiff can in no event exceed the amount of 100,000 cruzeiros (approximately US$ 365).

THIRD DEFENSE

The Complaint fails to state a claim upon which relief can be granted.

RAYMOND J. RASENBERGER

Bowen and Rasenberger
500 Wyatt Building
Washington 5, D.C.

Attorneys for Defendant

April 20, 1961

[Filed July 3, 1963]

MOTION OF DEFENDANT REAL AIRLINES FOR SUMMARY JUDGMENT AND CONSOLIDATION FOR ARGUMENT

Comes now the defendant Real S. A. Transportes Aereos and moves this Court for an Order granting summary judgment for the defendant, or in the alternative, for summary judgment for the defendant for so much of plaintiffs' claim as exceeds the U.S. equivalent of 100,000 cruzeiros, Brazilian currency, for the reason that there exists no genuine issue of fact, and the defendant is entitled to judgment as a matter of law.

The defendant Real S. A. Transportes Aereos moves that its Motion for Summary Judgment be consolidated for argument with the Motion for Summary Judgment of Defendant Varig Airlines in Civil Action No. 637-62.

For affidavits and other relevant exhibits and the Memorandum of Points and Authorities in support hereof, see affidavits, exhibits and the Memorandum of Points and Authorities for defendant Varig Airlines in support of its Motion for Summary Judgment in Civil Action No. 637-62.

/s/ JOHN L. LASKEY
/s/ RAYMOND J. RASENBERGER
Attorneys for Defendant

[Certificate of Service, dated July 3, 1963]

[Filed July 8, 1963]

MOTION OF DEFENDANT REAL AIRLINES FOR SUMMARY JUDGMENT AND CONSOLIDATION FOR ARGUMENT

Statement of Material Facts as to Which No Genuine Issues Exists

On February 25, 1960, a civilian DC-3 aircraft, owned by the defendant, Real Airlines, a Brazilian corporation, while on a flight from Campos, Brazil to Rio de Janeiro, Brazil, collided in the air space above Rio de Janeiro, Brazil, with a U.S. Navy R6D-1 aircraft en route from Buenos Aires, Argentina, to Galeao, Brazil. (Affidavit of Edilio Ramos Figueiredo, pages 2 and 3) Plaintiff's decedent, a passenger on board the U.S. Navy plane, died on the date of the collision as a result of injuries he sustained therein.

/s/ RAYMOND J. RASENBERGER
/s/ JOHN L. LASKEY
Attorneys for Defendant

[Certificate of Service, dated July 8, 1963]

[Filed October 14, 1963]

ORDER GRANTING SUMMARY JUDGMENT AND STETTING CAUSE

This cause coming on to be heard upon the Motion of the Defendant, Real S. A. Transportes Aeros, t/a Real Airlines, for summary judgment, upon the pleadings, affidavits and exhibits filed herein, it is by the Court this 14th day of October, 1963

ORDERED that the defendant's Motion be and the same hereby is granted as to so much of the plaintiffs' claims as exceed the dollar equivalent of one hundred thousand (100,000) cruzeiros in Brazilian currency for each of the deaths for which the several plaintiffs seek damages, and it is

FURTHER ORDERED that should plaintiffs establish a right to recovery herein, the total award to the plaintiffs, based upon the death of any one decedent, should not exceed the dollar equivalent of the sum of one hundred thousand (100,000) cruzeiros in Brazilian currency according to the prevailing rate of exchange on the date of entry of any such judgment, and it is

FURTHER ORDERED that proceedings in this case be stayed pending the final disposition of any appeal taken in the case of Beatrice Antonette Tramontana vs. S. A. Empresa De Viacao Rio Grandense, t/a Varig Airlines, Civil Action No. 637-62 in this Court, counsel having stipulated that the final ruling in said case will be controlling herein.

/s/ JOSEPH C. MCGARRAGHY
Judge

[Certificate of Service]

[Filed April 28, 1966]

MOTION TO CERTIFY CASE TO DISTRICT OF COLUMBIA COURT OF GENERAL SESSIONS

The defendant, Real S. A. Transportes Aereos, moves the Court for an Order certifying this case to the District of Columbia Court of General Sessions, and for grounds states that the Order entered herein on the 14th day of October, 1963 granting this defendant summary judgment as to so much of the plaintiffs' claims as exceed the dollar equivalent of one hundred thousand (100,000) cruzeiros for each of the deaths for which the several plaintiffs herein seek damages renders the plaintiffs' claims not susceptible of an award of an amount equaling ten thousand ($10,000.00) dollars and that, therefore, the claims are not within the jurisdiction of this Court but are within the jurisdiction of the District of Columbia Court of General Sessions.

/s/ HARRY A. BOWEN
/s/ THOMAS P. JACKSON
Attorneys for Defendant

[Certificate of Service, dated April 27, 1966]

[Filed June 28, 1966]

ORDER CERTIFYING CASE TO DISTRICT OF COLUMBIA COURT OF GENERAL SESSIONS

This case coming on to be heard at this term upon the Motion of the Defendant to Certify the Case to the District of Columbia Court of General Sessions, this Court having heretofore ruled by its Order of October 14, 1963 that Summary Judgment be entered for the defendant "as to so much of the plaintiffs' claims as exceed the dollar equivalent of one hundred thousand (100,000) cruzeiros in Brazilian currency for

each of the deaths for which the several plaintiffs seek damages, * * *" and that a recovery for any plaintiff "based upon the death of any one decedent, should not exceed the dollar equivalent of the sum of one hundred thousand (100,000) cruzeiros in Brazilian currency according to the prevailing rate of exchange on the date of entry of any such judgment, * * *" and counsel for plaintiffs having made no contention that the dollar equivalent of one hundred thousand (100,000) cruzeiros could now or at any time in the foreseeable future reach the ten thousand ($10,000.00) dollar jurisdiction limit of this Court, it is by the Court this 28th day of June, 1966

ORDERED that the defendant's Motion be and the same hereby is granted, and the Clerk is directed to certify this case to the District of Columbia Court of General Sessions.

/s/ JOSEPH C. McGARRAGHY
Judge

[Certificate of Service, dated June 27, 1966]

[Filed July 14, 1966]

NOTICE OF APPEAL

Notice is hereby given this 14th day of July, 1966, that the plaintiffs hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 28th day of June, 1966 in favor of defendant against said plaintiffs, certifying case to District of Columbia Court of General Sessions.

/s/ EUGENE GRESSMAN
Attorney for Plaintiffs

[Certificate of Service]

[Filed February 24, 1961]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MARJORIE H. ALBRECHT, as personal representative of William F. Albrecht, deceased, and individually; MICHAEL WILLIAM ALBRECHT, DOUGLAS FREDERICK ALBRECHT, ROBERT DUNCAN ALBRECHT, and DON ALBRECHT, all infants, by Next Friend Marjorie H. Albrecht, all of 6267 Akron Street, Deer Park Heights, Maryland, Washington 21, D.C.

DONALD N. BEIN, as personal representative of Henry Bein, deceased, 2816 Angus Road, Philadelphia, Pennsylvania; GERTRUDE BEIN, Carl Mackley Apartments, Apt. C-13, Philadelphia 24, Pennsylvania;

MARGARET K. CLARK, as personal representative of Robert L. Clark, deceased, and individually, 4028 24th Street, N.E., Washington, D.C.

ALBERT DESIDERIO, as personal representative of Albert J. Desiderio, deceased, and individually; CARMELA DESIDERIO; all of 336 WYNDMOOR ROAD, Springfield, (Delaware County), Pennsylvania;

PATRICIA F. HARL, as personal representative of Richard D. Harl, deceased, and individually; CATHERINE MARIE HARL, an infant, by Next Friend Patricial F. Harl; all of 2638 N. Frederick Avenue, Milwaukee 11, Wisconsin; and

CIVIL ACTION
NO. 600-61

ZEB V. YOUNG, as personal representative of Jefferson B. Young, deceased, and individually; GENERA C. YOUNG; all of P.O. Box 2161, Greensboro, North Carolina;

Plaintiffs

vs.

REAL S. A. TRANSPORTES AEREOS, a corporation, T/A REAL AIRLINES, Room 723, 1426 G Street, N.W., Washington, D.C.

Defendant

COMPLAINT FOR WRONGFUL DEATH

1. Plaintiffs Marjorie H. Albrecht, Michael William Albrecht, Douglas Frederick Albrecht, Robert Duncan Albrecht and Don Albrecht are citizens of the State of Maryland.

2. Plaintiffs Donald N. Bein and Gertrude Bein are citizens of the State of Pennsylvania.

3. Plaintiff Margaret K. Clark is a citizen of the United States and a resident of the District of Columbia.

4. Plaintiffs Albert Desiderio and Carmela Desiderio are citizens of the State of Pennsylvania.

5. Plaintiffs Patricia F. Harl and Catherine Marie Harl are citizens of the State of Wisconsin.

6. Plaintiffs Zeb V. Young and Genera C. Young are citizens of the State of North Carolina.

7. Defendant is a corporation incorporated under the laws of the United States of Brazil, and located and doing business in the District of Columbia at 1426 G Street, N.W.

8. The matters in controversy each exceed, exclusive of interest and costs, the sum of Three Thousand Dollars ($3,000.00).

9. On or about February 25, 1960, William F. Albrecht, Henry Bein, Robert L. Clark, Albert J. Desiderio, Richard D. Harl, and Jef-

ferson B. Young, all deceased, were passengers aboard a United States Navy R6D Aircraft flying at or near Rio de Janeiro, Brazil.

10. On or about February 25, 1960, at or near Rio de Janeiro, Brazil, defendant negligently and carelessly operated an aircraft so as to cause it to collide with the aforesaid United States Navy R6D Aircraft.

11. As a result of the aforesaid negligence of defendant the above-named deceased persons were then and there killed.

12. Defendant at all times prior and at the time of said collision had exclusive control and management of its aircraft which collided, and the collision resulting in the death of the above-named deceased persons was such that in the ordinary course of things it would not have occurred had the defendant exercised proper care; that both before and after said collision defendant had the sole and exclusive possession and custody of its aircraft, its parts and appurtenances, and the wreckage thereof, and is possessed of superior, if not exclusive, access to information concerning the precise cause of the collision; and plaintiffs rely herein, among other things, upon the negligence of defendant as inferred from the general situation herein alleged.

13. Plaintiff Marjorie H. Albrecht is the widow of, and plaintiffs Michael William Albrecht, Douglas Frederick Albrecht, Robert Duncan Albrecht, and Don Albrecht are the infant children of William F. Albrecht, deceased.

14. Plaintiff Gertrude Bein is the mother of Henry Bein, deceased.

15. Plaintiff Margaret K. Clark is the widow of Robert L. Clark, deceased.

16. Plaintiffs Albert Desiderio and Carmela Desiderio are the father and mother, respectively, of Albert J. Desiderio, deceased.

17. Plaintiff Patricia F. Harl is the widow of, and plaintiff Catherine Marie Harl is the infant child of Richard D. Harl, deceased.

18. Plaintiffs Zeb V. Young and Genera C. Young are the father and mother, respectively, of Jefferson B. Young, deceased.

19. By reason of the death of the above-named deceased persons the aforesaid personal representatives, heirs-at-law, next-of-kin, widows, fathers, mothers, and/or infant children have forever lost the benefit and advantage of the society, comfort, protection and guidance of their respective deceased person, and his maintenance and support of them. They have and will continue to suffer and endure extreme mental pain and anguish because of the death of their respective deceased person in the manner aforesaid, and have incurred funeral and other expenses incidental thereto.

WHEREFORE, plaintiffs each demand judgment against the defendant in the sum of One Hundred Thousand Dollars ($100,000.00) each and costs, and for such other and further relief as the Court deems necessary and proper.

The plaintiffs demand trial by jury.

WILLIAM HOWARD PAYNE
Attorney for Plaintiffs

ARTHUR P. SCIBELLI, of Counsel

[Filed April 20, 1961]

ANSWER OF DEFENDANT TO COMPLAINT

FIRST DEFENSE

1-6. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 1 through 6 of Plaintiffs' Complaint.

7. Defendant admits the allegations of paragraph 7 of the Complaint.

8. Defendant denies the allegation of paragraph 8 of the Complaint.

9. Defendant is without knowledge or information sufficient to

form belief as to the truth of the allegations contained in paragraph 9 of the Complaint.

10. Defendant admits that on or about Febraury 25, 1960 there was a collision between an aircraft operated by it and a United States Navy aircraft at or near Rio de Janeiro, Brazil, but Defendant denies the remaining allegations of paragraph 10 of the Complaint and denies any negligence on its part whatsoever.

11. Defendant denies that it was negligent in any manner so as to cause the death of any person. Defendant is without knowledge or information sufficient to form a belief as to whether the persons referred to in paragraph 11 of the Complaint were involved in the accident.

12. Defendant denies the allegations of paragraph 12 of the Complaint.

13-19. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 13 through 19 of the Complaint.

WHEREFORE, Defendant says that it is not indebted to Plaintiffs in any amount whatsoever.

SECOND DEFENSE

1. Defendant adopts herein the allegations of its first defense.

2. By reason of the fact that the aforesaid collision occurred within the sovereign air space of Brazil, Plaintiffs' rights of recovery, if any, are governed and controlled by the Codigo Brasiliero do Ar (Air Code of Brazil), and Defendant's liability thereunder is limited to 100,000 cruzeiros per person (approximately US$ 365).

WHEREFORE, Defendant's liability to each Plaintiff can in no event exceed the amount 100,000 cruzeiros (approximately US$ 365).

THIRD DEFENSE

The Complaint fails to state a claim upon which relief can be granted.

RAYMOND J. RASENBERGER
Attorney for Defendant

April 20, 1961

[Filed July 3, 1963]

MOTION OF DEFENDANT REAL AIRLINES FOR SUMMARY JUDGMENT AND CONSOLIDATION FOR ARGUMENT

Comes now the defendant Real S. A. Transportes Aereos and moves this Court for an Order granting summary judgment for the defendant, or in the alternative, for summary judgment for the defendant for so much of plaintiffs' claim as exceeds the U.S. equivalent of 100,000 cruzeiros, Brazilian currency, for the reason that there exists no genuine issue of fact, and the defendant is entitled to judgment as a matter of law.

The defendant Real S. A. Transportes Aereos moves that its Motion for Summary Judgment be consolidated for arguments with the Motion for Summary Judgment of Defendant Varig Airlines in Civil Action No. 627-62.

For affidavits and other relevant exhibits and the Memorandum of Points and Authorities in support hereof, see affidavits, exhibits and the Memorandum of Points and Authorities for defendant Varig Airlines in support of its Motion for Summary Judgment in Civil Action No. 637-62.

JOHN L. LASKEY
RAYMOND J. RASENBERGER
Attorneys for Defendant

[Certificate of Service, dated July 3, 1963]

[Filed October 14, 1963]

ORDER GRANTING SUMMARY JUDGMENT AND STETTING CAUSE

This cause coming on to be heard upon the Motion of the Defendant, Real S. A. Transportes Aeros, t/a Real Airlines, for summary judgment, upon the pleadings, affidavits and exhibits filed herein, it is by the Court this 14th day of October, 1963

ORDERED that the defendant's Motion be and the same hereby is granted as to so much of the plaintiffs' claims as exceed the dollar equivalent of one hundred thousand (100,000) cruzeiros in Brazilian currency for each of the deaths for which the several plaintiffs seek damages, and it is

FURTHER ORDERED that should plaintiffs establish a right to recovery herein, the total award to the plaintiffs, based upon the death of any one decedent, should not exceed the dollar equivalent of the sum of one hundred thousand (100,000) cruzeiros in Brazilian currency according to the prevailing rate of exchange on the date of entry of any such judgment, and it is

FURTHER ORDERED that proceedings in this case be stayed pending the final disposition of any appeal taken in the case of Beatrice Antonette Tramontana v. S. A. Empresa De Viacao Aerea Rio Grandense, t/a Varig Airlines, Civil Action No. 637-62 in this Court, counsel having stipulated that the final ruling in said case will be controlling herein.

/s/ JOSEPH C. McGARRAGHY
Judge

[Certificate of Service]

[Filed April 28, 1966]

MOTION TO CERTIFY CASE TO DISTRICT OF COLUMBIA COURT OF GENERAL SESSIONS

The defendant, Real S. A. Transportes Aereos, moves the Court for an Order certifying this case to the District of Columbia Court of General Sessions, and for grounds states that the Order entered herein on the 14th day of October, 1963 granting this defendant summary judgment as to so much of the plaintiffs' claims as exceed the dollar equivalent of one hundred thousand (100,000) cruzeiros for each of the deaths for which the several plaintiffs herein seek damages renders the plaintiffs' claims not susceptible of an award of an amount equalling ten thousand ($10,000.00) dollars and that, therefore, the claims are not within the jurisdiction of this Court but are within the jurisdiction of the District of Columbia Court of General Sessions.

HARRY A. BOWEN
JOHN L. LASKEY
THOMAS P. JACKSON
Attorneys for Defendant

[Certificate of Service, dated April 27, 1966]

[Filed June 17, 1966]

AFFIDAVIT

Margaret K. Clark, being duly sworn, does depose and say as follows:

1. I am one of the plaintiffs in the above-entitled action, suing both individually and as personal representative of my deceased husband Robert L. Clark.

2. At the time of the institution of this action, and at all other pertinent time I have been a legal resident of the District of Columbia and domiciled therein.

3. At the time of my said husband's death on February 25, 1960, he was a legal resident of the District of Columbia and domiciled therein.

4. At the time of his death and for some time previous thereto, my husband was a member of the United States Navy Band, a military establishment stationed and headquartered in the District of Columbia. The permanent headquarters of that organization were and are at the Sail Loft of the Navy Yard in Washington, D.C. Each member is an enlisted man in the Regular Navy and subject to military orders by the Commanding Officer of the U.S. Navy Station in Washington, D.C.

5. At the time of my husband's death, he was traveling in South America as a member of the United States Navy Band pursuant to military orders. The trip to South America that he was on both began and ended in Washington, D.C.

Signed this 12th day of June, 1966.

/s/ MARGARET K. CLARK

Signed and sworn to before me, a Notary Public in the District of Columbia, this 12th day of June, 1966.

/s/ ABE RUBIN
Notary Public, District of Columbia

[Filed June 28, 1966]

ORDER CERTIFYING CASE TO DISTRICT OF COLUMBIA COURT OF GENERAL SESSIONS

This case coming on to be heard at this term upon the Motion of the Defendant to Certify the Case to the District of Columbia Court of General Sessions, this Court having heretofore ruled by its Order of October 14, 1963 that Summary Judgment be entered for the defendant "as to so much of the plaintiffs' claims as exceed the dollar equivalent of one hundred thousand (100,000) cruzeiros in Brazilian currency for each of

the deaths for which the several plaintiffs seek damages, * * *" and that a recovery for any plaintiff "based upon the death of any one decedent, should not exceed the dollar equivalent of the sum of one hundred thousand (100,000) cruzeiros in Brazilian currency according to the prevailing rate of exchange on the date of entry of any such judgment, * * *" and counsel for plaintiffs having made no contention that the dollar equivalent of one hundred thousand (100,000) cruzeiros could now or at any time in the foreseeable future reach the ten thousand ($10,000.00) dollar jurisdiction limit of this Court, it is by the Court this 28th day of June, 1966

ORDERED that the defendant's Motion be and the same hereby is granted, and the Clerk is directed to certify this case to the District of Columbia Court of General Sessions.

JOSEPH C. McGARRAGHY
Judge

[Certificate of Service, dated June 27, 1966]

[Filed July 14, 1966]

NOTICE OF APPEAL

Notice is hereby given this 14th day of July, 1966, that the plaintiffs hereby appeal to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 28th day of June, 1966 in favor of defendant against said plaintiffs, certifying case to District of Columbia Court of General Sessions.

WILLIAM HOWARD PAYNE
Attorney for Plaintiffs

[Certificate of Service]

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 20,417

ANN E. ARMIGER, *et al.*,

Appellants,

v.

REAL S.A. TRANSPORTES AEREOS,

Appellee.

NO. 20,418

MARJORIE H. ALBRECHT, et al.,

Appellants,

v.

REAL S.A. TRANSPORTES AEREOS,

Appellee.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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Attorneys for Appellee

QUESTION PRESENTED

Did the District Court abuse its discretion in certifying these cases to the District of Columbia Court of General Sessions upon its conclusion that the maximum recovery therein, if any, must be limited by Brazilian legislation to a sum less than the jurisdictional minimum of the District Court?

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United States Court of Appeals

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Appellee.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE

SUMMARY OF ARGUMENT

I. The Stipulation to be bound by the final ruling in the *Tramontana* case was intended by all parties to provide that the present appellants would be limited by the Brazilian legislation or not, depending upon whether the plaintiff in *Tramontana* were to be so limited. Having made such a commitment, appellants should not be permitted to avoid its

consequence by distinguishing their own situations from that of the unsuccessful Mrs. Tramontana.

II. The *Tramontana* case holds that a District of Columbia forum will apply the measure of damages applicable in the jurisdiction having the most substantial interest in that issue. Since the Brazilian airline would face a disproportionately great loss directly, having foreseen no reason to anticipate and provide against it in advance, and since the interest of Brazil itself in the integrity of its aviation industry is greater than that of any single state in the compensation received by any of its individual residents, the Brazilian damage limitation should justly apply Moreover, considerations of diplomacy and comity, upon the authority of recent cases, require reference to the law of the territorial sovereign to determine the consequences of events occurring without the boundaries of the United States, especially if a foreign national is involved.

ARGUMENT

I.

Appellants Are Bound by Counsel's Stipulation To Abide the Outcome of the Tramontana Case

On October 14, 1963, these cases were stetted by Stipulation of counsel who agreed, for the sake of economy of effort, to be bound herein by the "final ruling" of this Court in *Tramontana v. Varig Airlines*, 121 U.S. App. D.C. 338, 350 F.2d 468 (1965), a case they expressly intended as the vehicle to determine whether a District of Columbia forum must or should apply Brazilian law to limit the maximum recovery possible in actions for the alleged wrongful death of American citizens in a mid-air collision of two aircraft in Brazilian airspace. (J.A. 20). At the time the Stipulation was made, counsel for all parties, al-

though possibly for different reasons, regarded the issues presented in the claims of each of the plaintiffs as indistinguishable on the basis of their respective places of residence and, as a consequence, neither side in Tramontana argued or anticipated the Court's concern with whether the result should vary as the treatment each plaintiff would have received had he filed suit in a court of his home state. The "final ruling" in *Tramontana,* contemplated by all parties to be controlling here, was whether summary judgment for the appellee would be affirmed or reversed, depending, of course, upon whether the Brazilian limitation would prevail over a claimed right to unlimited recovery, whatever the rationale upon which it depended. Certainly no Stipulation was necessary to make the law declared by this Court in an earlier case applicable to a later case upon similar facts, since *stare decisis* would give it such an effect regardless of the wishes of the parties. While the expression might have been more precise, and, of course, would have been had appellee foreseen these appeals, the agreement of the instant appellants to share the fate of the plaintiff in *Tramontana* is apparent from the fact that such a Stipulation was made at all.

Stipulations to be bound by the result in one case in succeeding cases arising upon the same or similar circumstances are common, and commonly enforced. 50 Am. Jur., "Stipulations," Sec. 18 (1944); Annot., 92 A.L.R. 663, 675 (1934). In the case of *John A. Knott, et al. v. St. Louis Southwestern Railway Co., et al.,* 230 U.S. 509 (1913), the Supreme Court said, with respect to several railroads' Stipulations to "abide by the orders, judgment, and decree that may be made and entered" in a suit by another railroad to enjoin enforcement of railroad fare rates, dismissing the appeals brought by the former in their own suits:

> "No questions for our consideration are presented by the appeals and cross-appeals in these cases. The remedy of the parties is to apply to the court below in accord-

> ance with the stipulations to have decrees entered in the respective suits similar to those which we have directed to be entered in the case to which the stipulations refer." 230 U.S., 511.

This Court should not allow appellants to evade a commitment of honor by an artful exploitation of the general language of the Stipulation, the obvious purpose of which was to provide that the issue then perceived by everyone to be the common denominator of eighteen cases be essayed on appeal only once.

II.

The Tramontana Case Holds That a District of Columbia Forum Will Apply the Measure of Damages for Wrongful Death Applicable in the Jurisdiction With the Most Substantial Interest in the Resolution of the Issue, Which, Regardless of the Residence of Plaintiffs, Is Brazil.

Appellants' argument that the *Tramontana* "ruling" agreed to be "controlling" herein requires a different result as to them, i.e., the possibility of an unlimited recovery, depends upon their interpretation of the *Tramontana* opinion as making the residence of the decedents' representatives determinative. If a court in a plaintiff's home jurisdiction would not refer automatically to foreign legislation applicable at the site of the fatal injury in assessing damages, but would "weigh contacts" and then find for its own bereaved domiciliary, then, the appellants say, the *Tramontana* holding requires a District of Columbia forum to do likewise.[1]

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[1] "The core of the *Tramontana* ruling was its recognition of controlling interest of the plaintiff's state of residence with respect to the issue of recoverable damages." (Appellants' Brief, page 17).

"The sole reason why the appellant in *Tramontana* was held bound by the Brazilian limitation of one hundred thousand (100,000) cruzeiros was this Court's belief that Maryland, the state of that appellant's residence, would have followed the *lex loci* principles which would not have permitted the factor of

Tramontana, however, did not give such prominence to the plaintiff's abode in searching for the most appropriate measure of damages. Acting as a hypothetical international tribunal *sans* national or territorial bias, the *Tramontana* court considered the interests of each of the several jurisdictions having reason to ask that their respective damage policies applied. The court concluded that the Brazilian airline, facing the greatest potential financial risk, and having had the least opportunity to have made advance provision against it, had the most compelling claim to the protection of its domestic legislation clearly intended to allocate that risk.

Concededly, Maryland's continued adherence to the traditional *lex loci delicti* rule disposed the Court to show no greater concern for the Maryland domiciliary than would her home forum. However, even had a confrontation of hostile policy between Maryland and Brazil been inevitable, with each inclined to give its citizen the maximum advantage of local law at the expense of a foreign litigant if its stake in the outcome were the more substantial, Brazil's interest would clearly preponderate. The Court said:

> "Not only is Brazil the scene of the fatal collision, but Varig is a Brazilian corporation which, as a national airline, is an object of concern in terms of national policy. To Brazil, the success of this enterprise is a matter not only of pride and commercial well being, but perhaps even of national security. The limitation on recovery against airlines operating in Brazil was enacted in the early days of commercial aviation, no doubt with a view toward protecting what was then, and still is, an infant industry of ex-

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residence to be weighed, much less to control, in the process of determining which law of damages to apply. It necessarily follows that where the law of the state of residence of some other plaintiff clearly permits such a weighing of competing interest, the District of Columbia must respect that law and will permit the controlling factor of residence to govern the issue of damages." (Appellants' Brief, pages 17-18)

traordinary public and national importance. The Brazilian limitation in terms applies only to airplane accidents, unlike the Massachusetts provision rejected in Kilberg, which was an across-the-board ceiling on recovery for wrongful death in that state. The focus of Brazilian concern could hardly be clearer.

"We have seen nothing that would suggest that Brazil's concern for the financial integrity of her local airlines should be less genuine now than when Article 102 was enacted, simply because of the depreciation of the cruzeiro. The failure to amend that provision may reflect a conscious desire to avoid enlarging the potential liability of local airlines during a period of general economic difficulty. It may represent an unwillingness to contribute to the inflationary spiral by adjusting 'prices' fixed by statute, which the government can control. Or it may be attributable in part to both motives. In any event, we are not persuaded that the fact of inflation itself — with a result that 100,000 cruzeiros are worth now considerably less than when the limitation was enacted — should be deemed to render obsolete Brazil's legitimate interest in limiting recoveries against their airlines." 121 U.S. App. D.C., 341-342.

That interest, if anything, is more acute here than in *Tramontana*. In Tramontana the anticipated loss, were an unfavorable verdict to have been returned, could not have exceeded the measurable pecuniary loss to the next-of-kin of a single decedent. Here seventeen personal representatives sue on behalf of an untold number of next-of-kin, and the cumulative present value to each of them represented by the life lost by his or her decedent in February, 1960, would represent a liability of crippling proportions to all but the most solvent of enterprises. The appellee would, of course, be required to pay such a judgment, in cash, or risk execution upon expensive assets it must move regularly into the District of Columbia and its adjoining jurisdictions. And, having apprehended no risk of loss from a tragedy such as this collision

in reliance upon the insulating domestic legislation which would protect it in the courts of Brazil, it assuredly faces a major loss against which it had no cause to acquire other protection.

In truth, appellee had greater reason to rely upon the damage limitation than appellants to rely upon any generous or humanitarian "public policy" of an American forum. Aviation is known, of course, to all who indulge in it, proprietor or participant, as a hazardous activity. Prudent foresight requires that provision be made against the risks it entails. On an international flight the financial risk is enhanced by the necessity of crossing territorial boundaries which signal changes not only in flight rules and currency, but also in legal relationships. Prior to their departure overseas, appellants' decedents knew, or should have known, of the varying risks to which they subjected their next-of-kin by participating, and the practice of having insured against such risks in the past was apparently well-established.[2] Conversely, at the time of its departure, those in charge of appellee's aircraft anticipated only those hazards incident to *intra*national flight, and in that connection, they could rely upon Article 102, Brazilian Code of the Air, to afford the necessary protection against a potential liability for loss of life on that flight. The odds against inflicting fatal injuries to persons who would be able to claim the protection of foreign law and foreign policy, and to enforce it in spite of Brazilian legislation opposed, were incalculable. Liability for a death without the scope of the local damage limitation was not even remotely foreseeable at the inception of the Campos to Rio de Janeiro flight.

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[2] It had been the practice since 1952 to provide Navy Band members with the opportunity to obtain commercial flight insurance, and the failure of appellants' decedents' superiors to obtain such insurance prior to the fatal flight in February, 1960, was the basis for an award of damages against the United States by the U.S. Court of Claims in the cases of E. L. Armiger, et al. v. United States and Marjorie H. Albrecht, et al. v. United States (Cong. No. 11-60) decided Dec. 11, 1964.

Moreover, these cases cannot be treated as laboratory models for an academic exercise in solving problems of conflict-of-laws. They involve more than the mere adjustment of competing interests within this Federal Union. Aircraft representing two national sovereigns collided in the airspace above the territory of one, precipitating, if this Court chooses to advance the interest of its citizens at the expense of a foreigner, difficult problems of diplomacy, comity and international commerce. Even if *Slater v. Mexican National R.R.*, 194 U.S. 120 (1904), is taken at its "highly attenuated precedential weight," other cases concerned with an adjustment of competing *international* interests suggest that the Brazilian legislation must be given the effect it would be given had this suit been commenced in Brazil. In the case of *Lauritzen v. Larsen*, 345 U.S. 571 (1953), a Danish seaman, signed aboard a Danish vessel in New York Harbor, was subsequently injured by the ship owner's negligence while the vessel was in Cuban territorial waters. The Supreme Court reversed a verdict for the seaman in an action under the Jones Act, 46 U.S.C., Sec. 688, holding that Congress did not intend the universal language of the Jones Act to apply to events having such tenuous territorial contact with the United States. The Court said:

> "Respondent places great stress upon the assertion that petitioner's commerce and contacts with the ports of the United States are frequent and regular, as the basis for applying our statute to incidents aboard his ships. But the virtue and utility of sea-borne commerce lies in its frequent and important contacts with more than one country. If, to serve some immediate interest, the courts of each were to exploit every such contact to the limit of its power, it is not difficult to see that a multiplicity of conflicting and overlapping burdens would blight international carriage by sea.
>
> * * *
>
> "We have held it a denial of due process of law when a state of the Union attempts to draw into control of its

> law otherwise foreign controversies, on slight connections, because it is a forum state .... Jurisdiction of maritime cases in all countries is so wide, and the nature of its subject matter so far-flung that there would be no justification for altering the law of a controversy just because local jurisdiction of the parties is obtainable." 345 U.S., 581, 590-591.

The "law of the controversy," upon the authority of unimpeachable admiralty decisions purporting to decide which nation's merchant marine should bear the loss occasioned by collision upon navigable waters, establishes that the law of the territorial sovereign governs the measure of damages in such cases, and these cases cannot be satisfactorily distinguished from that general rule because the instant collision occurred in a different medium. In *Black Diamond S.S. Corp. v. Stewart & Sons*, 336 U.S. 386 (1949), the Court determined that a Belgian damage limitation would apply to a suit in a United States forum arising from a collision of a U.S. vessel with a British ship in the territorial waters of Belgium. The Court said:

> ". . . (W)e turn to the question whether there are any circumstances under which the Belgian limitation would be enforceable by our courts. On this point we agree . . . that if, indeed, the Belgian limitation attaches to the right, then nothing . . . stands in the way of observing that limitation .... (I)f it is the law of Belgium that the wrong creates no greater liability than that recognized by the Convention of 1924, we cannot, without more, regard our own statutes as expanding the right to recover. *Any other conclusion would disregard the settled principle that, in the absence of some overriding domestic policy translated into law, the right to recover for a tort depends upon and is measured by the law of the place where the tort occurred."* 336 U.S., 395-396. (Emphasis supplied).

Still more recently, in a case in which a foreign national expressly invoked the protection of its territorial law against the claim of an American citizen who expected to benefit from the asserted "public policy" of the forum in his own national court, the Supreme Court directed reference to the law of the territorial sovereign to test the propriety of an act committed in another country. *Banco Nacional de Cuba v. Sabbatino,* 376 U.S. 398 (1964). Ostensibly the Court ratified the conduct of agents of the Cuban government in confiscating certain American property as an "act of state." The rationale, however, depended upon the stamp of legitimacy given the conduct of the Cuban officials by the Cuban legislation pursuant to which it was done. 376 U.S. 401, 438-439.

Even without reference to *Slater v. Mexican National R.R.*, 194 U.S. 120 (1904), and the line of cases employing its rationale, other decisions of the United States Supreme Court indicate that even the most appealing of public policies is insufficient to overcome the consequences imputed to events occurring within the territorial boundaries of a foreign sovereign, and the same rule prevails generally among the nations of the world. *Ehrenzweig, Conflict of Laws,* Sec. 211, Note 8 (1962); *Wolff, Private International Law,* Sec. 469 (2d Ed. 1950); *Dicey, Conflict of Laws,* Page 933 (7th Ed. 1958).

CONCLUSION

For the foregoing reasons, the Order of the District Court certifying these cases to the District of Columbia Court of General Sessions should be affirmed.

Respectfully submitted,

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